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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe, Plaintiff, vs. KENNETH SALAZAR, Secretary of the Interior; KEVIN WASHBURN, Assistant Secretary of the Interior – Indian Affairs; MICHAEL BLACK, Director, United States Bureau of Indian Affairs; and AMY DUTSCHKE, Director, Pacific Region, Bureau of Indian Affairs, Defendants.	CASE NO. 2:12-CV-03021-JAM-AC **PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S REQUEST FOR A TRO** DATE: March 20, 2013 TIME: 9:30 a.m. COURTROOM: 6, 14th Floor

1. Introduction

Defendants argue that the Court should not issue provisional relief because Plaintiffs purportedly fail each prong of the *Winter* test. As shown below, Defendants' arguments are without merit.

2. The Injuries to Plaintiff Are Irreparable

Without factual support, Defendants argue that the "the mere act of taking the Yuba Site into trust will [not] cause Plaintiff (or anyone else) injury." Opp. 6:16-17. As Plaintiff argued in its Motion for Preliminary Injunction and demonstrated in the Pullen and Fernandez declarations, the harm to Plaintiff will begin to accrue as soon as Defendants take the land into trust for Enterprise's casino. Plaintiff's MPA, ECF 8-1 ("MPA"), 15-20.

Relying upon the Supreme Court's recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012) ("*Patchak*"), Defendants argue that this Court may somehow "undo" any damage done to Plaintiff by taking the land into trust. Opp. 6:20-22. Even were Defendants correct that *Patchak* actually would authorize such a result, the fact is that once title to the land passes from the current owner (not Enterprise) to the United States in trust for Enterprise, "undoing" the transaction won't compensate Plaintiff for the damages it sustains while the land is in trust (the APA does not waive federal immunity to suit for such damages), and taking the land out of trust may prove impossible, whether because there is no Congressional authority for divesting the United States of title to land held in trust for a tribe, because once construction begins and substantial costs have been incurred the status quo will have changed irrevocably, or because the current owner of the land may prefer to keep the benefit of its bargain, rather than reacquiring title or permitting Enterprise to keep the land without paying for it.

Defendants argue that the Supreme Court in *Patchak* held that the decision to take land into trust is not irreparable because it can be undone. Opp. 6:20-22 (citing *Patchak*). However, *Patchak* actually held only that the district court had jurisdiction under the APA to review a decision to take land in trust for an Indian tribe. *Patchak* at 2204. The "parties agree[d] that the suit [] effectively seeks to divest the Federal Government of title to the land." *Id*. The case was not before the Supreme Court on the merits, but only on the matter of the jurisdiction of the federal courts. *Id*. at 2204 n. 2. The question of the plaintiff's mooted motion for preliminary injunction was not before the Court, and the Supreme Court focused on the grievance, not the requested remedy. *Id*. at 2208.

3. The Injuries to Plaintiff Are Imminent

Defendants argue that the injuries to Plaintiff are speculative. Opp. 7:20-21. In fact, Plaintiff's projected injuries are based on empirical evidence gained through the hard experience of having other tribes, in particular the United Auburn Indian Community, open casinos within the primary market area of Plaintiff's own casino, among other things. *E.g.*, MPA 16. Because the Yuba Site is closer to Colusa than Auburn or Colusa's primary markets in the Marysville/Yuba City/Sacramento area, or indeed, Enterprise's own existing reservation trust lands, the unrebutted evidence submitted by Plaintiff in support of its motion for injunctive relief clearly supports a

finding that the Plaintiff's claims of harm are very real, and not speculative at all.

Defendants also argue that a newly-enacted regulation requires notice to the National Indian Gaming Commission before a casino opens. Opp. 8:2-6. The purpose of the regulation is to "ensure" gaming is conducted in a manner that "protects the environment and the public health and safety." 25 CFR 559.1. As the NIGC wrote in its notice announcing the rule:

> The notification requirement does not provide for approval or disapproval by the Chair. The notification does not grant or deny permission to a tribe to begin construction on a new gaming facility.

77 Fed. Reg. 58769, 58770 (2012).

In support of its argument that Colusa's injuries are not immediate, Defendants rely upon the declaration of Glenda Nelson. That declaration was prepared not in support of Defendant's opposition, but in support of the opposition attempted to be filed by a would-be intervenor. Opp. 8:1-2. As set forth in Plaintiff's separately-filed Motion to Strike/Objections to Ms. Nelson's declaration, Plaintiff objects to the Court's receipt or reliance on Ms. Nelson's declaration, based on its inadmissibility in whole or in part under various Federal Rules of Evidence. Moreover, although Defendants argue that the Court may rely upon Nelson's "commitments" as maintaining the *status quo*, and that when she gives her promised 30-day notice, the Court may revisit the question of a preliminary injunction at that time, Opp. 9:10-11, the Court should decline the Defendants' invitation to defer to Enterprise's purported determination of its own construction plans in determining whether to issue an injunction.

Plaintiff's action is against Defendants for procedural violations of the APA, 25 U.S.C. §§ 465 & 2719, and NEPA; it is not a suit against Enterprise and its investor. As such, neither Defendants nor this Court have the ability to enforce the gratuitous and non-binding assertions made in Ms. Nelson's declaration.

Moreover, there is no evidence submitted with the declaration in support of the assertions made about the *potential* delays facing Enterprise and its investor if the land is taken into trust on or about February 1, 2013. Opp. 8:17-21. Even if the statements of Chairperson Nelson were taken at face value, there is no evidence that Nelson, who describes herself as Chairperson of the "Estom Yumeka Maidu Tribe of the Enterprise Rancheria," can bind Enterprise, such as resolutions of the

governing body of that tribe, which is the General Council (all adult, qualified members of the tribe). While the "Enterprise Rancheria of Maidu Indians of California" appears on the list of federally recognized Indian tribes, the "Estom Yumeka Maidu Tribe of the Enterprise Rancheria" does not. 75 Fed. Reg. 60810 (2010).

4. Plaintiff Is Likely to Succeed on the Merits of its NEPA Claims

Defendants seek to make it appear that the question in this case is merely one of commercial competition and Plaintiff's desire to avoid competition. *E.g.*, Opp. 5:4 & 10:18. In fact, Plaintiff's tribal government casino is the primary source of funding for the support of Plaintiff's tribal government and the programs that it alone provides for its members, exactly as intended by IGRA, 25 USC § 2701, and akin to the support of government programs by the state lottery. Thus, when Defendants facilitate the construction of a new tribal casino not on an existing reservation, but in a location unconnected to an existing reservation that effectively will deprive Plaintiff's casino of a large percentage of both its existing customer base and existing employees in a tightly-controlled market, it is a matter of more than mere free-market competition.

As Defendants concede, however, the use of bad economic data can give rise to a NEPA violation if it undermines the evaluation of adverse environmental impacts or the public's ability to evaluate the project. Opp. 13:20. Plaintiff's argument is not that the EIS should evaluate the economic impacts in a vacuum, but as the basis for taking a "hard look" at the social and environmental impacts premised on the faulty economic data in the EIS. If Plaintiff is deprived of the revenues needed to operate its Reservation water supply, wastewater treatment and other facilities, there will be adverse environmental impacts on Plaintiff's Reservation.

In support of the alternatives analysis of the FEIS, Defendants argue that the range of alternatives was broad enough, and that the burden is on Plaintiff to provide another alternative. Opp. 11-12. Defendants are wrong on both arguments. NEPA requires that agencies evaluate "all reasonable alternatives." 40 CFR 1502.14; *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998). The range of alternatives did not change appreciably between the Environmental Assessment, begun by Enterprise in 2002 and rejected by BIA in 2005, and the FEIS, begun in 2005 and finalized in 2009. Rather than analyze a broad range of reasonable alternatives,

the FEIS only analyzed the possibility of building on either the Tribe's reservation in Butte County or on a single site near Marysville and Sacramento, a site that just happened to be owned by Enterprise's investor, YCE.

Although Defendants assume that Plaintiff agrees that the Enterprise Rancheria itself is an infeasible site for a casino, Opp. 12:4-17, that assumption is incorrect. The Enterprise Rancheria is closer to major towns than Colusa's own casino, and there is nothing in the record to suggest that lands perfectly suitable for the construction of a casino are not readily available in Butte County. Defendants also argue that the purported fact that a reservation casino would result in "minimal to no profits," would run counter to the policy objectives of IGRA. Opp. 12:13 & 16. In fact, the "minimal profits" were projected to be significant, although they pale beside the projected profits from a Marysville casino. *E.g.*, MPA 11. Defendants admitted in the ROD that congressional intent in IGRA was to confine tribal government casinos to those reservations that existed when Congress debated the Act in 1988. 2012 ROD at 44. Moreover, while IGRA gave every tribe with Indian lands the opportunity to engage in government gaming, it did not guarantee every tribe the right to locate a casino in an optimal market, particularly when doing so would destroy the markets of tribes with less favorable locations. By Defendants' reasoning, every tribe – no matter where located – with Indian lands located distant from a major population center should be able to have land taken into trust for gaming near an urban area with which the tribe has no existing connection.

Defendants find Plaintiff's objection to DOI's preference for the "proposals that promised greater revenue for Enterprise . . . difficult to understand . . . because, as recognized by IGRA, a principal goal of federal Indian policy is to promote tribal economic development." Opp. 13:5-8. The policy objectives of IGRA are not confined to Enterprise, however; they include support of the tribal governments of Colusa and the other tribes that stand to lose substantially all of their business, and thus support for their governments, to Enterprise. 25 USC § 2701; MPA 11. Further, while Defendants cite "proposals" in the plural, the preference was actually for a single proposal – the one Enterprise proposed in 2002, and from which it did not waver for ten years.

Defendants also rely upon the fact that Enterprise and its contractor, *not BIA*, narrowed down the range of potential sites to support the reasonableness of the range of two alternative sites studied

in the FEIS, and find that the reasons that the *tribe* rejected those alternatives "on their face, seem compelling." Opp. 12:18-20. The common thread for Enterprise's rejection of the two alternative, window-dressing sites is not that the sites were not physically suited for casino construction, but that it could not secure investors for a casino on those sites. Opp. 12-13. Defendants should not be surprised by that fact: Enterprise's investor at the time, YCE, did not own those properties.

Despite failing to address a reasonable range of alternatives, Defendants argue that the burden is on Plaintiff to supply a reasonable alternative, citing *Morongo v. FAA*. Opp. 11. In *Morongo*, the tribe claimed that FAA had examined an insufficient range of alternative flight paths that would direct flights away from the Reservation. *Morongo* at 575. The FAA had actually analyzed several different flight paths, including at least one that avoided the Morongo Reservation. *Id.* at 576. The Ninth Circuit found, consistent with longstanding NEPA law, that in a highly technical disagreement between experts, the FAA could rely upon its own expert. *Id.* Further, in the cases relied upon by *Morongo*, the plaintiffs had not "structure[d] their participation so that it . . . alert[ed] the agency to the intervenors' position and contentions." *Id.* (citations omitted). As Defendants concede, Plaintiff did so in this case.

5. Plaintiff is Likely to Succeed on the Merits of its 25 CFR Part 151 & 292 Claims

Defendants argue that Plaintiff's argument that DOI should have consulted with it as required by IGRA is barred because Plaintiff did not exhaust its administrative remedies. Opp. 20. Defendants do not identify the remedies that Plaintiff did not exhaust, however. After informal attempts were unsuccessful, Plaintiff submitted a request for consultation in 2009, which was met with a refusal. *Id.* Information indicating that the proposed project would "cannibalize" the casino upon which Plaintiff's government depends was in the hands of Defendants, and had been since 2002. Keohane Dec., Exh. 3A at 20 (initial application identifying Colusa as closest competition for YCE's casino). Without an avenue for administrative appeal, and no means for judicial review of a non-final agency action, no other "prescribed administrative remedy" remained to "be[] exhausted." Opp. 20:17-19 (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). In any event, Plaintiff sought to make its concerns known through Defendants' opaque administrative process by commenting on the EIS. 2012 ROD Exh. A.

Defendants incorrectly assert that Plaintiff conceded that it did not meet the definition of "nearby Indian tribe." Opp. 20:13-15. In fact, Colusa qualifies as a "nearby Indian tribe" under both IGRA and the regulations that DOI adopted partway through consideration of the Enterprise application. MPA 6-7. Plaintiff also argues that those regulations were adopted in violation of the APA. *Id.* at 7. Under the definition of "nearby Indian tribe" applicable until 2008, based on IGRA and DOI's unpublished regulations, Defendants should have consulted with Plaintiff as a tribe within 50 miles of the Yuba Site, because the Gaming Acquisition Checklist and the Fee-to-Trust Handbook are treated by DOI and the public alike as binding regulation, controlling what information applicants must submit and what information DOI will consider. *Id.*

Defendants argue that they could choose not to consult until after adoption of the Part 292 regulations in 2008 because nothing required them to do so. Opp. 22. Defendants' own published and non-published regulations, however, mandate consultation as soon as the outline of the proposal is known – the proposal in this case has not changed since 2002. *Compare* Final EIS with 2002 Enterprise Application, Keohane Dec., Exh. 3A. It was therefore arbitrary and capricious for BIA to delay, much less sit on its hands and await the new regulations to give it an excuse *not* to consult, given that the questions of whether the acquisition of the Yuba Site for gaming purposes would detrimentally affect nearby tribes was under active consideration by Enterprise and its environmental contractor, if not BIA, for six years prior to promulgation of the regulation. *Id.* Defendants also incorrectly argue that the "consultation procedure mandated by IGRA's implementing regulations has nothing to do with NEPA." Opp. 22:8-9. NEPA is, however, intended to integrate with an agency's own procedures. *E.g.*, 40 CFR 1501.4(a). Since the RODs, which memorialize Defendants' findings on Enterprise's application under Part 151 and Part 292, both relied upon the EIS for their findings, Defendants' argument appears to be without merit.

Plaintiff contends that it adequately demonstrated that it met the new definition of "nearby" in Part 292 by requesting consultation, and on the basis of the information in BIA's hands showing that Enterprise intended to interpose itself between other tribes, particularly Plaintiff, and their primary market in Sacramento. FEIS Appendix M, RJN Exh. 5; Keohane Dec. Exh. 3A. Alternatively, Plaintiff contends that the Part 292 regulation's definition is unreasonable. Defendants point out that

commenters on the rule argued that the limit was too short, Opp. 21:7-23, but fail to note that while DOI responded that a 25 mile limit for consultation with local non-tribal governments was based on experience, it gave no basis for applying the 25-mile limit to tribal governments. MPA 7:1-10; 73 Fed. Reg 29354, 29357 (2008). Such a short distance is inherently unreasonable given the fact that other Indian tribes depend on their *existing* casinos to support their governmental operations and that 25 miles is a very short distance in light of the advent of the automobile, whereas the effects on non-tribal governments are not due to competition for customers, but, generally, to the physical impacts of the proposed casino on local services and communities.

Defendants argue that the Fee-to-Trust Handbooks and Gaming Acquisition Checklists issued by DOI from time-to-time in consultation with Indian tribes are not binding regulations. Opp. 17-18 & 22 n. 10. The Handbooks and Checklists, however, establish not just matters of general policy, but mandate how fee-to-trust decisions are made. MPA 4:22-28 & 6-7. In a footnote, Defendants assert that the Gaming Acquisition Checklists are non-binding and cite to D.C. Circuit precedent for that proposition. Opp. at 22 n. 10 (citing *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 29 n. 3 (D.C. Cir. 2008) ("*MichGO*"). *MichGO*, however, found that the argument that the Checklist was binding was "not appropriately developed and thus not properly before the court," and that the argument that "ignoring non-binding regulations is arbitrary and capricious . . . [was] waived as it is raised only in the reply brief." *MichGo* at 29 n. 3 (citations omitted).

With regard to the Yuba Site itself, Defendants argue that their misidentification of the site over the course of at least two years was harmless error. Opp. 18-19; *but see*, 2011 Fee-to-Trust Handbook at 65, RJN Exh. 7 (Office of Indian Gaming will ensure that the legal description is consistent throughout). The decisions made contemplated a legal parcel that actually exists on the tax rolls of the County of Yuba, however. MPA 5:13-17; Keohane Dec. Exh. 3B at 6. It was that parcel that was the legal basis of the findings of the 2011 and 2012 RODs, because that was the legal description attached thereto. *Id.* The EIS and other documents described the Yuba Site as 40 acres, while the parcel described in the 2011 Letter to Gov. Brown and the attachments to the 2012 ROD was 80 acres in size, leaving uncertainty as to which 40 or 80 acres were actually analyzed. MPA 5. Marketable title requires a definite legal description, and the United States may

only accept marketable title to land.

Enterprise's need for the Yuba Site, which is a requirement under DOI's regulations, is likewise indeterminate. MPA 9:7-15. Defendants make the argument that since the ROD identifies needs and identifies a use, that is enough. Opp. 23-24. "It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," not Defendants' after-the-fact rationalization of their decisions. *Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1120 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). Defendants' justification for obtaining land for Enterprise is replacement of the 40 acres of trust land that were sold by the United States in 1965. MPA 9:11; 2012 ROD at 44. Those inundated lands had been used for housing and Enterprise has indicated that it has purchased over 63 acres of land for housing in the last decade. MPA 9:16; Keohane Dec. Exh. 3C at 4-5. Enterprise has both a 40-acre reservation and 63 acres of housing land for which it has not submitted an application for the United States to take into trust, Defendants must address the need for the land beyond just conclusory statements that the land will "further" economic development. Opp. 23-24. Aside from the requirements of the Part 151 regulations, the so-called need would not provide a reasoned basis for taking any land into trust so long as some business could take place on it.

6. The Balance of the Equities Tips Sharply in Favor of Plaintiff

In arguing that Plaintiff's need for injunctive relief is not imminent, Defendants assert that Enterprise and its investor supposedly will not act for months. *E.g.*, Opp. 7-8. In arguing that the balance of the equities and the public interest weigh in favor denying an injunction, however, Defendants argue that Enterprise and its investor must have the Yuba Site held in trust as soon as possible so that they may immediately begin the work that will lead to generating income. Opp. 24-25. Among other purported injuries put forward by Defendants is the purported delay in purchasing even more land for residences for Enterprise tribal members. Opp. 25:6-7. Enterprise has, however, over 63 acres of land on which to build residences. MPA 9. Indeed, according to a November 9, 2012 notice in 77 F.R. p. 67387, judicial notice of which hereby is requested, the federal Department of Housing and Urban Development has granted Enterprise $595,000 to purchase four existing homes.

After waiting more than ten years to make a decision on Enterprise's application, a delay of a few months in taking the Yuba Site into trust status will do no harm to Defendants' interest in addressing Enterprise's economic position. If, as Defendants argue, Enterprise and its investor will take no action for four months after February 1, 2013, Enterprise will not be harmed by a delay either.

In contrast, Plaintiff has not delayed in addressing its concerns to Defendants and then to this Court. It sought consultation with Defendants on the Enterprise application; Defendants declined to consult. It sought relief from this Court as soon as Defendants made a final agency decision. While Defendants argue that the benefits to Enterprise may not come for months or years, Opp. 8-9, or may come immediately, Opp. 24-25, the harms to Colusa will begin to accrue as soon as the land is taken into trust. MPA 11.

7. A Preliminary Injunction Would Serve the Public Interest by Maintaining the Status Quo

The several months of delay occasioned by the granting of provisional relief will not undermine the public interest in furthering Indian self-government, Opp. 25:21, because that policy equally supports furthering the self-government of Plaintiff and each of the other tribes whose governments will be harmed by Enterprise leap-frogging over them to intercept their existing markets. While the Defendants delayed for more than ten years before making their decision on Enterprise's application, a delay of a few months to permit effective judicial review of that decision would be insignificant.

8. Conclusion

For the foregoing reasons, the Court should grant Plaintiff's motion for a Temporary Restraining Order, and thereafter preliminarily enjoin Defendants from taking the Yuba Site into trust until Plaintiff's action can be resolved on its merits.

Dated: January 23, 2013

Respectfully Submitted,

FORMAN & ASSOCIATES

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